IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

290

JAMES M. HURD AND MARY I. HURD, *Petitioners*,

v.

FREDERIC E. HODGE, ET AL., *Respondents*.

291

RAPHAEL G. URCIOLO, ET AL., *Petitioners*,

v.

FREDERIC E. HODGE, ET AL., *Respondents*.

BRIEF OF THE FEDERATION OF CITIZENS ASSOCIATIONS OF THE DISTRICT OF COLUMBIA, INC., CITIZENS FORUM OF COLUMBIA HEIGHTS, WASHINGTON, D. C., THE WHEEL OF PROGRESS, WASHINGTON, D. C., AND COLUMBIA IMPROVEMENT ASSOCIATION, INC., WASHINGTON, D. C., AMICI CURIAE.

E. HILTON JACKSON,
WADE B. HAMPTON,
JOHN W. JACKSON,
626 Woodward Building,
Washington 5, D. C.

Attorneys for The Federation of Citizens Associations of the District of Columbia, Inc., Citizens Forum of Columbia Heights, Washington, D. C., The Wheel of Progress, Washington, D. C., and Columbia Improvement Association, Inc., Washington, D. C., Amici Curiae.

INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

290

JAMES M. HURD and MARY I. HURD, *Petitioners*,

v.

FREDERIC E. HODGE, ET AL.; *Respondents*.

291

RAPHAEL G. URCIOLO, ET AL., *Petitioners*,

v.

FREDERIC E. HODGE, ET AL., *Respondents*.

BRIEF OF THE FEDERATION OF CITIZENS ASSOCIATIONS OF THE DISTRICT OF COLUMBIA, INC., CITIZENS FORUM OF COLUMBIA HEIGHTS, WASHINGTON, D. C., THE WHEEL OF PROGRESS, WASHINGTON, D. C., AND COLUMBIA IMPROVEMENT ASSOCIATION, INC., WASHINGTON, D. C., AMICI CURIAE.

PRELIMINARY STATEMENT.

This brief is filed, with consent of counsel for Petitioners and Respondents, on behalf, and by authority, of the Federation of Citizens Associations of the District of Columbia, Inc., Citizens' Forum of Columbia Heights, Washington, D. C., The Wheel of Progress, Washington, D. C., and Columbia Improvement Association, Inc., Washington, D. C.,

all organized and active citizens associations, and interested in the general improvement and civic betterment of the District of Columbia. The Federation of Citizens Associations is a federation of sixty-nine (69) white citizens associations. These member associations cover the entire area of the District of Columbia and their membership represents a large cross-section of its people. The interest of these organizations in the question at issue arises from their firm conviction that it is in the public interest, and in the mutual interest of the two dominant races, that the rule of law, established by numerous decisions of the highest court of the District of Columbia over a quarter of a century, validating and enforcing restrictive covenants, be confirmed by this court.

THE FACTS.

The facts, as to which there is no substantial dispute, are stated in detail in the opinion of the Court below, and in the briefs of Petitioners and Respondents. It is not deemed necessary to reiterate them here. Briefly, in 1906 twenty (20) lots improved by residences on Bryant Street, Northwest, in the District of Columbia, were sold and conveyed under duly recorded deeds, said deeds containing the following restrictive covenant:

> "Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two thousand dollars ($2000), which shall be a lien against said property."

Subsequently, in 1944 and 1945, four (4) of these residence properties were sold and conveyed to negroes in violation of said covenant. The District Court, on final judgment, declared the four deeds to the negro purchasers null and void, ordered them to vacate, and granted the injunctive relief sought by the Respondents. This action was affirmed by the United States Court of Appeals of the District of Columbia.

THE ISSUE.

The primary issue is whether said restrictive covenant is a valid contract, free from constitutional or other lawful inhibitions, and enforceable by injunction in a court of equity.

THE ARGUMENT.

I. Restrictive deed covenants have been consistently upheld in the District of Columbia.

Over the period of a quarter of a century the highest court in the District of Columbia has consistently upheld the validity of restrictive covenants as expressed in deeds, or by agreements between owners of land. There has been no conflict in these decisions, as is evidenced by the following cases:

Torrey v. Wolves, 56 App. D. C. 4, 6 F. (2d) 702; Cornish v. O'Donoghue, 58 App. D. C. 359, 30 F. (2d) 983, cert. denied, 279 U. S. 871; Grady v. Garland, 67 App. D. C. 73, 89 F. (2d) 817, cert. denied, 302 U. S. 694; Hundley v. Gorewitz, 77 U. S. App. D. C. 48, 132 F. (2d) 23; Corrigan v. Buckley, 55 App. D. C. 30, 299 Fed. 899, appeal disunissed 271 U. S. 323; Russell v. Wallace, 58 App. D. C. 357, 30 F. (2d) 981, cert. denied, 279 U. S. 871; Mays v. Burgess, 79 U. S. App. D. C. 343, 147 F. (2d) 869, cert. denied, 325 U. S. 868, rehearing denied 325 U. S. 896.

All of the substantial contentions advanced by the Petitioners in the case at bar were presented to the court in the above cases, considered, and rejected. If there is one rule of law that is firmly established by the adjudicated cases in the District of Columbia it is that restrictive covenants, such as the one in the case at bar, are valid and enforceable contracts, not inhibited by a statute, the constitution, or public policy, nor do they constitute an illegal restraint on alienation. It is to be noted that in connection with four of these cases certiorari was denied.

II. In the case of Corrigan v. Buckley the Supreme Court has already adjudicated and rejected four of the major contentions of the Petitioners.

One of the above cases, arising in the District of Columbia, reached the Supreme Court, Corrigan v. Buckley, 271 U. S. 323. Unless we wholly misinterpret the pronouncements of the Court, in its determination of the question of jurisdiction, the Court held, in effect, in that case:

(1) That a contention that a covenant between private individuals forbidding the sale of real estate to persons of the Negro race violates the 5th and 14th Amendments to the Federal Constitution is entirely lacking in substance and color of merit.

(2) That a contract between private individuals that certain property shall not be sold to persons of the Negro race is not prohibited by the 5th or 14th Amendments; that the 5th Amendment "is a limitation only upon the powers of the general government * * *—and is not directed against the action of individuals"; that "the prohibitions of the 14th Amendment have reference to state action exclusively, and not to any action of private individuals. . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment." The Court, continuing, said: "It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void."

(3) That the Civil Rights Statutes, paragraphs 1977, 1978 and 1979 of the Revised Statutes, "do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void."

(4) That a decree enforcing a contract between private individuals forbidding the sale of property to persons of the Negro race does not unconstitutionally deprive persons of property without due process of law, where the persons were afforded a full hearing, and the decree was not so plainly arbitrary and contrary to law as to be an act of mere spoliation.

The Court, failing to find any substantial constitutional or statutory question conferring jurisdiction, declined to determine the following contentions:

(a) That the indenture was void because contrary to public policy.

(b) That the indenture was of such discriminatory character that a Court of Equity should not lend its aid by enforcing specific performance of it.

If we have correctly interpreted the Corrigan case, it seems clear that this Court has already finally adjudicated the major contentions of Petitioners, except the two issues set out under (a) and (b) above. The contention of Petitioners that this case is not decisive of any of the issues in this case, and, therefore, mere dictum, is utterly untenable. Consequently, we will devote a major portion of the remainder of this brief to the two issues not determined by the Corrigan case.

However, before taking up the two issues, still undetermined by this Court in the Corrigan case, we call attention to three cases relied on with great emphasis in the brief of Petitioners, as well as in the Amicus Curiae briefs, to sustain their contentions, namely:

Buchanan v. Worley, 245 U. S. 60;
Harmon v. Tyler, 273 U. S. 668;
City of Richmond v. Demas, 281 U. S. 704.

It is submitted with assurance that these three cases have no decisive, or even persuasive, application to the issues in the case at bar. All of these cases involve legis-

lative attempts to limit the use and ownership of real property, and relate exclusively to state action. In each case the Court did no more than hold that legislative action of a state, based solely on color, was inhibited by the 14th Amendment of the Federal Constitution. In numerous cases, this Court has distinguished with clearness between state legislation, municipal ordinances, and *private contracts of individuals*, and has said, in effect, that the policy manifested in the 14th Amendment was adopted to prevent *state legislation* designed to perpetuate discrimination on the basis of race or color.

> Railroad Mail Association v. Corsi, 326 U. S. 88;
> Plessy v. Ferguson, 163 U. S. 537.

In the case at bar, the rights of Respondents are based on their contract, which rights should be distinguished from the power to legislate. The rights of individuals to contract in relation to their own property are as definitely safeguarded under the Constitution as the right to the protective provisions of the 5th and 14th Amendments against state or federal legislative action. The fundamental right of private contract has been applied consistently in validating restrictive covenants created by private contracts.

> Mead v. Dennistone (1938), 173 Md. 295, 196 A. 330;
> Hemsly v. Hough-Okla (1945), 156 P. 2d 182.

These two cases distinguish between *restrictions created by private* contract and state *legislative enactments*.

III. The restrictive covenant in question is not contrary to Public Policy as that Policy finds its expression in the District of Columbia.

Public policy, like "general welfare" and "due process of law," is not subject to precise definition. Generally, it appears to be well settled that the sources of public policy are the principles of the common law, the constitution, the

statutes, the judicial opinions, and the general customs of the jurisdiction where the question is being adjudicated. Measured by these yardsticks, it is obvious that the covenant in question is not contrary to the public policy of the District of Columbia, for the following reasons:

(a) We have demonstrated above that there are no constitutional inhibitions against the covenant;

(b) Congress, exercising police power in the District of Columbia, has not explicitly inhibited the covenant. Concretely, it has provided separate schools, recreational facilities, and hospitals for white and colored, and, the administration of these facilities, recognizes the separation of the races. Funds are annually appropriated for these facilities on that basis. Federal housing agencies, under acts of Congress, administer these laws on a basis of separate developments for whites and negroes.

(c) For a period of twenty-five (25) years the United States Court of Appeals of the District of Columbia has consistently validated restrictive covenants. That judicial policy is well-settled under a long line of decisions.

(d) In the area of general custom and public opinion, the general policy prevails in the District of Columbia of separating the white and colored races in churches, hotels, restaurants, lodging houses, and places of amusement.

In the case of Mays v. Burgess, 79 App. D. C. 343, 147 F. 2d 869, Chief Justice Groner, with accuracy and clearness, applied the law in the District of Columbia, on the question of public policy, to restrictive covenants, in this language:

"As stated before, rights created by covenants such as these have been so consistently enforced by us as to become a rule of property and within the accepted public policy of the District of Columbia.

"Little need now be said on the subject of that policy. The proposition is not new and was unsuccessfully urged in the Corrigan case, supra, in this court and in the Supreme Court. And nothing is suggested now

that was not considered them. The Constitution is the same now as then, and we are cited to no new public laws, nor indeed to any other course or practice of Government officials, which the private action of the original owners of the block in question contravenes. And the public policy of a State of which courts take notice and to which they give effect must be deduced in the main—from these sources. Surely it may not—properly—be found in our personal views on sociological problems. As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and are approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons. And these accepted practices are not intended to and should not be considered to imply the inferiority of either race to the other."

It is further submitted that no over-all statement of general objectives—comparable to the general welfare clause of the Federal Constitution—as found in the United Nations Charter can be applied to the private contract rights of citizens of the District of Columbia, in the absence of specific legislation by Congress limiting these fundamental rights.

IV. The restrictive covenant in question is clearly enforceable in a Court of Equity under the Fifth and Fourteenth Amendments and such enforcement is not "state action" as contemplated by Buchanan v. Worley, supra.

This Court held in Corrigan v. Buckley, supra, that the 5th Amendment is a limitation on the powers of the general government, and that the 14th Amendment has reference to *state action exclusively* and not to any action of private individuals, that is, that it is *state action of a particular character* that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.

The petitioners contend that a court of equity cannot enforce a restrictive covenant contract because the courts are a part of the government and are inhibited under the authority of Buchanan v. Worley, supra. In other words, they attempt to identify the judicial action of the court as "state action" prohibited by the 14th Amendment as interpreted in the Buchanan case. The Buchanan case specifically held that the attempt by a state, by municipal ordinance, to prevent the use or transfer of land to a person solely because of color was not "a legitimate exercise of the police power of the State." It is clear that it is not the province of a court to "exercise the police power of the state." The truth is that the courts are coordinate departments of government, exercising their powers and performing their functions entirely independent of the executive or legislative departments. They are the final sources of authority where citizens may go for relief from the oppressive exercise of the police power of the state. They constitute a separate and unique form of government function. They have power to nullify acts of Congress, or to protect the rights of citizens where the state or federal governments improperly exercise their governmental functions. Certainly, it cannot be fairly said that the adjudication of a court is "state action" in the sense in which that term is used under the authority of the Buchanan case. This Court, in United States v. Dunnington, 146 U. S. 338, said:

> "The courts of the United States are in no sense agencies of the Federal Government, nor is the latter liable for their errors or mistakes; they are independent tribunals, created and supported, it is true, by the United States; but the government stands before them in no other position than that of an ordinary litigant."

It seems clear, therefore, that action of the courts of the District of Columbia, in enforcing contract rights between individuals in the instant case, was not "state action" as defined in the Buchanan case under the 14th Amendment.

In the Buchanan case the city ordinance did not create a private property right, nor do zoning ordinances create private rights; they may be changed at the will of the town council or legislature. In the case at bar, respondents had defined property rights and the Constitution guarantees to all citizens due process of law in the enforcement of their private contract rights and the equal protection of the laws. The contention of Petitioners was squarely met in Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146, P. 2d 720 where the Court said:

> "The decree of the trial court in the instant case was not, within constitutional principles, action by the State through its judicial department. Plaintiffs' rights are derived from their contract, the subject matter of which belonged exclusively to the contracting parties * * * if the contract is valid it cannot be nullified under any theory that courts are without power to enforce it."

To sustain the contention of the Petitioners would be to deny to Respondents one of the fundamental privileges of citizenship, access to the courts.

V. The restrictive covenant in question is not an undue and unlawful restraint on alienation.

The contention of Petitioners on this proposition is clearly untenable. The case of Cowell v. Colorado Springs, 100 U. S. 55, 25 L. ed. 547, appears to be decisive on this issue. There the Court said:

> "But the answer is that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character."

The case at bar falls clearly under the latter portion of said classification. The owner may sell, under the covenant in question, to at least seventy percent of the people in the District of Columbia and, under the rule of Hundley v. Gorewitz, supra, if conditions in the neighborhood change so that the purposes of the covenant cannot be carried out, it will not be enforced.

In summary, the restrictive covenant here in question is a valid, fundamental property right. It is clearly not inhibited by the Constitution of the United States or invalidated by Acts of Congress. It is not an undue restraint on alienation or contrary to the public policy of the District of Columbia. Therefore, it is clearly enforceable in a court of equity by injunction, or other appropriate judicial decree, on the petition of parties whose rights are violated.

It is, therefore, respectfully submitted that the judgment of the lower court should be affirmed.

E. Hilton Jackson,
Wade B. Hampton,
John W. Jackson,
626 Woodward Building,
Washington 5, D. C.,

Attorneys for The Federation of Citizens Associations of the District of Columbia, Inc., Citizens Forum of Columbia Heights, Washington, D. C., The Wheel of Progress, Washington, D. C., and Columbia Improvement Association, Inc., Washington, D. C., Amici Curiae.

SUPREME COURT OF THE UNITED STATES

Nos. 290 AND 291.—OCTOBER TERM, 1947.

James M. Hurd and Mary I. Hurd, Petitioners, v. Frederic E. Hodge, Lena A. Murray Hodge, Pasquale DeRita, et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.
290	
Raphael G. Urciolo, Robert H. Rowe, Isabelle J. Rowe, et al., Petitioners, v. Frederic E. Hodge, Lena A. Murray Hodge, Pasquale DeRita, et al.	
291	

[May 3, 1948.]

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These are companion cases to *Shelley* v. *Kraemer* and *McGhee* v. *Sipes*, *ante*, p. —, and come to this Court on certiorari to the United States Court of Appeals for the District of Columbia.

In 1906, twenty of thirty-one lots in the 100 block of Bryant Street, Northwest, in the City of Washington, were sold subject to the following covenant:

> ". . . that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two Thousand Dollars ($2,000), which shall be a lien against said property."

The covenant imposes no time limitation on the restriction.

Prior to the sales which gave rise to these cases, the twenty lots which are subject to the covenants were at

all times owned and occupied by white persons, except for a brief period when three of the houses were occupied by Negroes who were eventually induced to move without legal action. The remaining eleven lots in the same block,[1] however, are not subject to a restrictive agreement and, as found by the District Court, were occupied by Negroes for the twenty years prior to the institution of this litigation.

These cases involve seven of the twenty lots which are subject to the terms of the restrictive covenants. In No. 290, petitioners Hurd, found by the trial court to be Negroes,[2] purchased one of the restricted properties from the white owners. In No. 291, petitioner Urciolo, a white real estate dealer, sold and conveyed three of the restricted properties to the Negro petitioners Rowe, Savage, and Stewart. Petitioner Urciolo also owns three other lots in the block subject to the covenants. In both cases, the Negro petitioners are presently occupying as homes the respective properties which have been conveyed to them.

Suits were instituted in the District Court by respondents, who own other property in the block subject to the terms of the covenants, praying for injunctive relief to enforce the terms of the restrictive agreement. The cases were consolidated for trial, and after a hearing, the court entered a judgment declaring null and void the deeds of the Negro petitioners; enjoining petitioner Urciolo and one Ryan, the white property owners who had sold the houses to the Negro petitioners, from leasing, selling or conveying the properties to any Negro or colored person; enjoining the Negro petitioners from leasing

[1] All of the residential property in the block is on the south side of the street, the northern side of the street providing a boundary for a public park.

[2] Petitioner James M. Hurd maintained that he is not a Negro but a Mohawk Indian.

or conveying the properties and directing those petitioners "to remove themselves and all of their personal belongings" from the premises within sixty days.

The United States Court of Appeals for the District of Columbia, with one justice dissenting, affirmed the judgment of the District Court.[3] The majority of the court was of the opinion that the action of the District Court was consistent with earlier decisions of the Court of Appeals and that those decisions should be held determinative in these cases.

Petitioners have attacked the judicial enforcement of the restrictive covenants in these cases on a wide variety of grounds. Primary reliance, however, is placed on the contention that such governmental action on the part of the courts of the District of Columbia is forbidden by the due process clause of the Fifth Amendment of the Federal Constitution.[4]

Whether judicial enforcement of racial restrictive agreements by the federal courts of the District of Columbia violates the Fifth Amendment has never been adjudicated by this Court. In *Corrigan* v. *Buckley*, 271 U. S. 323 (1926), an appeal was taken to this Court from a judgment of the United States Court of Appeals for the District of Columbia which had affirmed an order of the lower court granting enforcement to a restrictive covenant. But as was pointed out in our opinion in *Shelley* v. *Kraemer*, *supra*, the only constitutional issue which had been raised in the lower courts in the *Corrigan* case, and, consequently, the only constitutional question

[3] — U. S. App. D. C. —, 162 F. 2d 233 (1947).

[4] Other contentions made by petitioners include the following: judicial enforcement of the covenants is contrary to § 1978 of the Revised Statutes derived from the Civil Rights Act of 1866 and to treaty obligations of the United States contained in the United Nations' charter; enforcement of the covenants is contrary to the public policy; enforcement of the covenants is inequitable.

before this Court on appeal, related to the validity of the private agreements as such. Nothing in the opinion of this Court in that case, therefore, may properly be regarded as an adjudication of the issue presented by petitioners in this case which concerns, not the validity of the restrictive agreements standing alone, but the validity of court enforcement of the restrictive covenants under the due process clause of the Fifth Amendment.[5] See *Shelley* v. *Kraemer*, *supra* at —.

This Court has declared invalid municipal ordinances restricting occupancy in designated areas to persons of specified race and color as denying rights of white sellers and Negro purchasers of property, guaranteed by the due process clause of the Fourteenth Amendment. *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *Richmond* v. *Deans*, 281 U. S. 704 (1930). Petitioners urge that judicial enforcement of the restrictive covenants by courts of the District

[5] Prior to the present litigation, the United States Court of Appeals for the District of Columbia has considered cases involving enforcement of racial restrictive agreements on at least eight occasions. *Corrigan* v. *Buckley*, 55 App. D. C. 30, 299 F. 899 (1924); *Torrey* v. *Wolfes*, 56 App. D. C. 4, 6 F. 2d 702 (1925); *Russell* v. *Wallace*, 58 App. D. C. 357, 30 F. 2d 981 (1929); *Cornish* v. *O'Donoghue*, 58 App. D. C. 359, 30 F. 2d 983 (1929); *Grady* v. *Garland*, 67 App. D. C. 73, 89 F. 2d 817 (1937); *Hundley* v. *Gorewitz*, 77 U. S. App. D. C. 48, 132 F. 2d 23 (1942); *Mays* v. *Burgess*, 79 U. S. App. D. C. 343, 147 F. 2d 869 (1945); *Mays* v. *Burgess*, 80 U. S. App. D. C. 236, 152 F. 2d 123 (1945).

In *Corrigan* v. *Buckley*, *supra*, the first of the cases decided by the United States Court of Appeals and relied on in most of the subsequent decisions, the opinion of the court contains no consideration of the specific issues presented to this Court in these cases. An appeal from the decision in *Corrigan* v. *Buckley*, was dismissed by this Court. 271 U. S. 323 (1926). See discussion *supra*. In *Hundley* v. *Gorewitz*, *supra*, the United States Court of Appeals refused enforcement of a restrictive agreement where changes in the character of the neighborhood would have rendered enforcement inequitable.

of Columbia should likewise be held to deny rights of white sellers and Negro purchasers of property, guaranteed by the due process clause of the Fifth Amendment. Petitioners point out that this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943), reached its decision in a case in which issues under the Fifth Amendment were presented, on the assumption that "racial discriminations are in most circumstances irrelevant and therefore prohibited. . . ." And see *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944).

Upon full consideration, however, we have found it unnecessary to resolve the constitutional issue which petitioners advance; for we have concluded that judicial enforcement of restrictive covenants by the courts of the District of Columbia is improper for other reasons hereinafter stated.[6]

Section 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866,[7] provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is en-

[6] It is a well-established principle that this Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case. Recent expressions of that policy are to be found in *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129 (1946); *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947).

[7] 14 Stat. 27. Section 1 of the Act provided: ". . . That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment,

joyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." [8]

All the petitioners in these cases, as found by the District Court, are citizens of the United States. We have no doubt that, for the purposes of this section, the District of Columbia is included within the phrase "every State and Territory." [9] Nor can there be doubt of the constitutional power of Congress to enact such legislation with reference to the District of Columbia.[10]

We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding of *Corrigan* v. *Buckley, supra.*

In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope

---

pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, 16 Stat. 144, passed subsequent to the adoption of the Fourteenth Amendment. Section 1977 of the Revised Statutes (8 U. S. C. § 41), derived from § 16 of the Act of 1870, which in turn was patterned after § 1 of the Civil Rights Act of 1866, provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[8] 8 U. S. C. § 42.

[9] Cf. *Talbott* v. *Silver Bow County*, 139 U. S. 438, 444 (1891).

[10] See *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 442–443 (1923).

and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve.

Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress.[11] Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment.[12] It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land.[13] Others supported

[11] The Civil Rights Act of 1866 became law on April 9, 1866. The Joint Resolution submitting the Fourteenth Amendment to the States passed the House of Representatives on June 13, 1866, having previously passed the Senate on June 8. Cong. Globe, 39th Cong., 1st Sess. 3148–3149, 3042.

[12] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess. 2459, 2461, 2462, 2465, 2467, 2498, 2506, 2511, 2538, 2896, 2961, 3035.

[13] Thus, Mr. Thayer of Pennsylvania, speaking in the House of Representatives, stated: "As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, . . . in order . . . that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States." Cong. Globe, 39th Cong., 1st Sess. 2465. And note the remarks of Mr. Stevens of Pennsylvania in reporting to the House the joint resolution which was subsequently adopted as the Fourteenth Amendment. *Id.* at 2459. See also *id.* at 2462, 2896, 2961. That such was understood to be a primary purpose of the Amendment is made clear not only from statements of the proponents of the Amendment but of its opponents. *Id.* at 2467, 2538. See Flack, The Adoption of the Fourteenth Amendment 94–96.

the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.[14]

The close relationship between § 1 of the Civil Rights Act and the Fourteenth Amendment was given specific recognition by this Court in *Buchanan* v. *Warley*, *supra* at 79. There, the Court observed that, not only through the operation of the Fourteenth Amendment, but also by virtue of the "statutes enacted in furtherance of its purpose," including the provisions here considered, a colored man is granted the right to acquire property free from interference by discriminatory state legislation. In *Shelley* v. *Kraemer*, *supra*, we have held that the Fourteenth Amendment also forbids such discrimination where imposed by state courts in the enforcement of restrictive covenants. That holding is clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act in their application to the Courts of the District of Columbia.

Moreover, the explicit language employed by Congress to effectuate its purposes, leaves no doubt that judicial enforcement of the restrictive covenants by the courts of the District of Columbia is prohibited by the Civil Rights Act. That statute, by its terms, requires that all citizens of the United States shall have the same right "as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."

---

[14] No doubts were expressed as to the constitutionality of the Civil Rights Act in its application to the District of Columbia. Senator Poland of Vermont stated: "It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress." Cong. Globe, 39th Cong., 1st Sess. 2961. See also *id.* at 2461, 2498, 2506, 2511, 2896, 3035.

That the Negro petitioners have been denied that right by virtue of the action of the federal courts of the District is clear. The Negro petitioners entered into contracts of sale with willing sellers for the purchase of properties upon which they desired to establish homes. Solely because of their race and color they are confronted with orders of court divesting their titles in the properties and ordering that the premises be vacated. White sellers, one of whom is a petitioner here, have been enjoined from selling the properties to any Negro or colored person. Under such circumstances, to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold, and convey real property is to reject the plain meaning of language. We hold that the action of the District Court directed against the Negro purchasers and the white sellers denies rights intended by Congress to be protected by the Civil Rights Act and that, consequently, the action cannot stand.

But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States,[15] and as such should be corrected by this Court in the exercise of its supervisory powers over the courts of the District of Columbia.[16] The power of the federal courts to enforce

[15] See *United States* v. *Hutcheson*, 312 U. S. 219, 235 (1941); *Johnson* v. *United States*, 163 F. 30, 32 (1908).

[16] Section 240 (a) of the Judicial Code, 43 Stat. 938, 28 U. S. C. § 347 (a), provides: "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.[17] Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[18]

We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment. *Shelley* v. *Kraemer*, *supra*. It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws.[19] We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

---

[17] *Muschany* v. *United States*, 324 U. S. 49, 66 (1945). And see *License Tax Cases*, 5 Wall. 462, 469 (1867).

[18] Cf. *Kennett* v. *Chambers*, 14 How. 38 (1852); *Tool Co.* v. *Norris*, 2 Wall. 45 (1865); *Sprott* v. *United States*, 20 Wall. 459 (1874); *Trist* v. *Child*, 21 Wall. 441 (1875); *Oscanyan* v. *Arms Co.*, 103 U. S. 261 (1881); *Burt* v. *Union Central Life Insurance Co.*, 187 U. S. 362 (1902); *Sage* v. *Hampe*, 235 U. S. 99 (1914). And see *Beasley* v. *Texas & Pacific R. Co.*, 191 U. S. 492 (1903).

[19] Cf. *Gandolfo* v. *Hartman*, 49 F. 181, 183 (1892).

SUPREME COURT OF THE UNITED STATES

Nos. 290 AND 291.—OCTOBER TERM, 1947.

James M. Hurd and Mary I. Hurd, Petitioners, 290 v. Frederic E. Hodge, Lena A. Murray Hodge, Pasquale DeRita, et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.
Raphael G. Urciolo, Robert H. Rowe, Isabelle J. Rowe, et al., Petitioners, 291 v. Frederic E. Hodge, Lena A. Murray Hodge, Pasquale DeRita, et al.	

[May 3, 1948.]

MR. JUSTICE FRANKFURTER, concurring.

In these cases, the plaintiffs ask equity to enjoin white property owners who are desirous of selling their houses to Negro buyers simply because the houses were subject to an original agreement not to have them pass into Negro ownership. Equity is rooted in conscience. An injunction is, as it always has been, "an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion." *Morrison* v. *Work*, 266 U. S. 481, 490. In good conscience, it cannot be "the exercise of a sound judicial discretion" by a federal court to grant the relief here asked for when the authorization of such an injunction by the States of the Union violates the Constitution—and violates it, not for any narrow technical reason, but for considerations that touch rights so basic to our society that, after the Civil War, their protection against invasion by the States was safeguarded by the Constitution. This is to me a sufficient and conclusive ground for reaching the Court's result.